IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG CARLSON TELEPHONE MANUFACTURING COMPANY, *Appellants*, v. UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Appellees*.	No. 554
COLUMBIA BROADCASTING SYSTEM, INC., *Appellant*, v. UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Appellees*.	No. 555

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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BRIEF FOR AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

Preliminary Statement

The case comes before this Court on appeal from the decision of a statutory three-judge district court granting the motion of the respondent, the Federal Communications Commission, for summary judgment in two actions brought by the appellant networks and two affiliates of

one of them to "annul" certain Regulations* of the Commission and to enjoin their enforcement.

The American Civil Liberties Union, a non-partisan, non-sectarian organization, with a membership of thousands of persons in all States of the Union, has for the past two decades or more endeavored to carry out its object as stated in its charter—namely, "to maintain throughout the United States and its possessions the rights of free speech, free press, free assemblage and other civil rights, and to take legitimate action in furtherance of such purposes."

The Regulations which the appellants are seeking to annul and enjoin have, in our opinion, a clear and direct relation to freedom of speech over the air since they are designed to secure that diversity of control in the absence of which such freedom is seriously jeopardized. The Union therefore files this brief as *amicus curiae*. We shall concern ourselves with the relation of the challenged Regulations to diversity of control and therefore of expression over the radio and to the authority of the Commission to give consideration to the promotion of such diversity in exercising its licensing powers.

The Opinion Below

Judge Learned Hand, speaking for the unanimous Court below, held that the Commission had the power to promulgate the Regulations complained of and that they were neither "arbitrary or capricious". With reference to the charge of the appellants that the Regulations interfered with their freedom of speech in violation of the First Amendment, Judge Hand pointed out that it was precisely

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* Regulations 3.101 to 3.108 inclusive, adopted by the Federal Communications Commission on May 2, 1941, amended Oct. 11, 1941 and promulgated in connection with the Commission's "Report on Chain Broadcasting".

"the public interest * * * in free speech itself" which dictated their promulgation. By reason of the network practices and contractual arrangements which are the subject of the Regulations, the Commission, said Judge Hand, was in a position where it had to choose between the interests of "listeners", "licensees who may prefer to be freer of the 'networks'" and "future competing 'networks'" on the one hand and the present "networks" and their "affiliates" on the other (R. 529). By issuing Regulations aimed against those practices and arrangements the Commission elected to favor the first group of interests and made clear its belief that greater freedom of expression over the air was served thereby. As Judge Hand indicates, the Commission would equally have made a choice as directly impinging on freedom of speech had it not issued the Regulations, allowed the *status quo* to remain undisturbed, and favored the interests of the present networks and their affiliates at the expense of the other groups mentioned, which include the public. Compare *Miller* v. *Schoene* (276 U. S. 272). The American Civil Liberties Union agrees with the choice represented by the Regulations and believes that they are in the direction of greater freedom of speech over the air.

POINT I

The public interest requires the removal of artificial impediments to diversity over the radio. The challenged Regulations are appropriate to that end.

A. The Public Interest in Diversity Over the Radio

Competition in the field of commodities has always been recognized as a cardinal principle of our economic system. Competition in the field of ideas is even more fundamental to our democratic way of life. Unless par-

ticular ideas have competitors in the market place of thought, or at the very least, unless there is a potentiality for such competition, there can be no freedom of thought or expression. Freedom implies access to diverse points of view and the right to pick and choose among them. Since the American Civil Liberties Union is dedicated to the preservation of freedom of thought and expression it considers it a duty to sponsor developments which look in the direction of encouraging such diversity and of discouraging bottleneck contractual devices. The Union recognizes the danger that a public demand for government censorship of radio may be created by a too great concentration of control in a few private hands, and believes that freedom from censorship is assured only when ideas are in the freest possible competition with each other.

When the Bill of Rights with its guarantees of free speech and free press first became a part of our national pattern, there was scant need of governmental regulation looking in the direction of diversity of sources of information. Communities were small enough so that democracy had a plain everyday meaning and town meetings were the order of the day. Newspapers were small and, as compared with the population, plentiful; unlike today, it did not require the investment of millions of dollars to start one. Pamphleteering was an important mode of forming public opinion. And above all, living was on a scale compact enough to permit of direct first hand knowledge of most of the events of importance to the average man, and what was being thought about those events. An instrumentality which would make it possible for one man orally to address 130,000,000 at the same time had not even been conceived of.

Guarantees of freedom do not operate *in vacuo* but take on meaning only in the light of the particular setting in which they are applied. The setting today is very

different from that which prevailed in 1789. Virtually none of us today has or can have direct first hand knowledge even of the issues which most importantly affect us. Town meetings are for the most part regarded as relics of the horse and buggy days. Even the public rostrum has lost most of its former significance. Because of the evolution of modern modes of transportation and communication, the emphasis has shifted from local to national and international problems. This very universality of our concerns makes it more than ever important that we have access to the greatest possible diversity of sources of information. All other channels of communication have paled into comparative obscurity alongside of the three mighty pipe lines of knowledge which today hourly feed into the market place of thought the fare which nourishes the minds not of hundreds, nor thousands but literally of millions of people: the newspapers, the motion pictures and the radio. But, for every individual who listens to a street-corner address there are tens of thousands who listen to a radio speech.

Because of the overwhelming coverage of the radio in terms both of matters broadcast and listening audience—a coverage which dwarfs every other form of communication ever known to man—diversity of control over what goes over the air waves is particularly vital. Bad as it might be for ten or twelve or twenty men to have the absolute power to determine what we may hear in our local meeting halls, it would be far more pernicious for a like number to dominate what goes over the air waves. Yet the Report of the Federal Communications Commission on the basis of which the Regulations challenged in this case were issued, discloses a narrowing spiral of concentration of control in a few hands of what the American public should hear over the radio. Each of the devices condemned by the Commission has for its aim

domination by the networks in New York City of what shall go over the wave lengths of the radio stations scattered over the whole of the United States. To the extent that such domination is achieved, the right to listen, which for most people today is the significant sector of the right of free speech, is in the hands of a dwindling group of private entrepreneurs.

In what follows it must be borne in mind that there are only a limited number of wave lengths available for standard broadcasting purposes. By reason of the limitations of the medium, the number of entities which can enjoy the high privilege of holding licenses for radio stations is sharply restricted. Faced with this scientific necessity, Congress delegated to the Federal Communications Commission the task of allocating the available wave lengths according to the dictates of "public interest, convenience or necessity" and thus implicitly enjoined on the Commission the duty of maintaining competition over the air. If there were an unlimited number of wave lengths of equal power available for use, it may be that free competition itself would serve to prevent undue concentration of control in the hands of a few. But here there are no effective substitutes; competitors cannot suddenly spring up to challenge the position of the established chains. In effect what the Regulations of the Commission seek to do is to create the kind of competitive situation which would normally exist if substitutes and new competition were possible. Incidentally, it may be noted in passing that the percentage of profit, *i.e.*, return on investment made by the networks, is so large as to indicate still further that a truly competitive situation does not exist. If it did, it may be presumed that competition would be glad to enter the field even for a much lower return.

Again—in what follows we are making no comment or criticism as to the merits or demerits of the persons who

now dominate the radio pipe lines into the market of thought. From our point of view, we must assume that they are as wise and fair as could be selected by any other method. We are concerned only with the need for diversity of control over the air waves so that the listening public may have access to diverse programs and ideas. We would oppose government domination of broadcasting at least as strongly as any other centralization of the power over the radio. Being an organization devoted to the preservation of freedom of thought and expression, we are concerned with only one thing—that what goes over those pipe lines is the product of as many minds as possible. We object to private parties entering into restrictive covenants which impinge upon our capacity to hear. Only if we have access to many and diverse sources of knowledge, information and belief, can we exercise that prerogative of our democracy known as reaching our own conclusions as opposed to accepting on faith the conclusions of others. Moreover, it is important that local issues as well as national and international ones be the focus of discussion over the radio; democracy also resides in local communities. For this reason, too, control of the air waves should not be too concentrated in the hands of nation-wide entities far removed from matters of purely local concern.

To the extent that the challenged Regulations of the Commission are directed to securing diversity, we wish to go on record as favoring them. We shall now point out the integral relationship of each of the Regulations to this essential problem.

B. The Challenged Regulations Are in Aid of Diversity Over the Radio

1. In General

There are four major national networks: The Red network of the National Broadcasting Company, the Blue

network of the Blue Network Company,* the Columbia Broadcasting System and the Mutual Broadcasting System. The "Report on Chain Broadcasting" issued by the Federal Communications Commission in May of 1941 (Commission Order No. 37, Docket No. 5060), fully summarized in the Commission's brief, reveals that prevailing conditions as to ownership of networks and stations, and contractual terms of affiliation between networks and stations today head up into three chief results all immensely damaging to that diversity which is vital to the preservation of free speech over the air. First, they render it virtually impossible for any new network to become established; second, by fiat, they keep substantial portions of the American people from having any access to important programs; and third, they operate with increasing efficacy to wrest from local radio stations their selective functions, thereby concentrating domination of the nationwide air waves in the hands of the chains in New York City. As the Report shows, this tendency away from diversification toward concentration has been increasing by geometric progression as new stations have been contractually dominated by the chains and as the terms of affiliation have become increasingly stringent. It seems reasonable to assume that unless the Commission steps in now to prevent still further centralization in the hands of the networks, the American people will have to choose between control over the air waves by a few corporation officials and control over the air waves by a few government officials. Both alternatives are destructive of a free market in thought. It is believed that the principles adopted by the Commission are well designed to avoid both evils and to effectuate that competition for control of what goes over the air waves which

* Both these companies are subsidiaries of the Radio Corporation of America.

it was one of the basic purposes of the Communications Act to preserve.

Before summarizing the content and scope of the challenged Regulations, we respectfully submit that the prohibitions they embody are analogous to, and indeed in *pari materia*, with the general federal anti-trust statutes, the Sherman Anti-Trust Act and the Clayton Act.

The provisions of the organic Communications Act are a piece with the predecessor anti-monopoly statutes of general application to industry, commerce, and trade, and incorporate the prohibitions against the historic modes of restraint of trade and monopolistic practices. Sections of the Communications Act explicitly and in terms proscribe monopoly and monopolistic practices in radio communication. See, *e.g.*, 47 *U. S. C. A. 311, 313, 314.* These statutory provisions project into the radio field principles familiar in the general anti-trust policy.

It is indubitable, as this Court in construing the Communications Act has authoritatively stated, that Congress in framing it intended that restraints of trade, monopolistic practices, and unfair competition should be outlawed and prohibited.

Thus, in *Federal Communications Commission* v. *Sanders*, 309 U. S. 470, 476, this Court stated that the supposed granting of monopolistic power to a broadcasting company is expressly negatived by the Act. Earlier in *Federal Communications* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, the Court had said:

> "Congress moved under the spur of a widespread fear that in the absence of government control the public interest might be subordinated to monopolistic domination in the broadcasting field."

It follows inexorably that under the anti-monopoly provisions of the Communications Act (one of a series of

cognate federal statutes to prevent and prohibit monopoly, monopolistic practices, and restraints of trade) and by reason of the clearly stated principles enunciated by this Court in construing that Act well recognized evils, familiar in anti-trust history, such as tying clauses and exclusive dealing (see Sec. 3 of the Clayton Act), boycotting, involuntary restraints of trade directed against third parties, and similar discriminatory tactics destroying competition and freedom of enterprise are within the prohibitions of the Act and that it is appropriately within the Federal Communications Commission's power and authority to promulgate regulations prohibiting such activities.

Directly analogous to the relationship of the anti-monopoly provisions of the Communications Act to the general Congressional anti-trust policy, is the incorporation by reference in proceedings under the Federal Trade Commission Act of previous federal anti-trust legislation. In *Federal Trade Commission* v. *Beechnut Packing*, 257 U. S. 441, at page 453, precedents under the Sherman Act were employed to show a declaration of public policy, to be considered in determining what were unfair methods of competition which the Federal Trade Commission was empowered to condemn and suppress. The Communications Act, like the Trade Commission Act, was intended by Congress to supplement previous anti-trust legislation, and condemnation of the well known restraints of trade and monopolistic practices, familiar in the anti-trust cases, must equally be carried over into the anti-monopoly provisions of the Communications Act in the establishment of the criterion of the "interest, convenience or necessity" which governs the exercise of the licensing power.

2, The Challenged Regulations

3.101 and 3.102

The first two of the challenged rulings relate to exclusivity. 3.101 declares that it shall be the policy of the Commission not to grant a license to standard broadcast stations which contract with a network to boycott the programs of any other network. Most C. B. S. contracts contain a clause of the type here condemned. Although nominally N. B. C. also objects to the Commission's declaration of policy on these clauses, actually its complaint does not attack the Commission's report in this regard and if the ruling of the Commission were adhered to, it would not necessitate any change in the N. B. C. contracts. This fact alone refutes Columbia's contention that the inclusion of such a clause is necessary to effective network operation.

The narrowing effect of such a clause on the range of programs available to the residents of a particular locality can be and often is considerable. For example in cities where there are less than four stations (and there are some 45 such cities with populations of 50,000 or more) the listening audience would be cut off entirely from the programs of one or more of the existing national networks if each of them insisted on the inclusion of such a clause in its contract with its local affiliate. Under the typical Columbia contract, a local Columbia station would not be free to carry the broadcasts of a commentator who is on another network between 10 and 10:15 P. M., even if that local station did not choose to carry the regular Columbia broadcast at that time and even if the other network had no station in that area. This blackout on the commentator would be the result not of the impact of audience reaction but of restrictive covenants which pre-

clude the possibility of an audience test in the particular locality.

Stated in other terms "Information Please" would be unable to get to local audiences where the particular network has no affiliate, unless a station existed in the area willing to be bound by the long term network affiliation contract—in effect covering innumerable other programs as well. This is block booking of ideas at its worst. These clauses which prohibit local stations from accepting the broadcasts of other networks proceed on a boycott ideology where the public interest is not served by a boycott. They are in fact ukases issued by the networks against free competition.

Regulation 3.102 covers another aspect of exclusivity. It declares that no license shall be granted to a station which contracts with a network that the network will not supply a program to any other station in the area, regardless of whether its own affiliate rejects or accepts its programs. Under such a clause, for example, if the local C. B. S. affiliate in a particular area does not choose to carry the Philharmonic broadcasts (being sustaining, such broadcasts can be rejected at will) C. B. S. is none the less automatically debarred from allowing any other station in that area to have these broadcasts. Again, the incursion on the right to listen is clear. The clauses here criticized can and have in actual practice so operated that a particular network program has been entirely excluded from a given locality. The Regulations take cognizance of the chief reason advanced by the networks for the inclusion of such clauses, namely, the necessity for regular network affiliation, for they permit the networks to contract to give a first refusal of their programs to their own affiliates.

These exclusivity clauses proceed out of the desire of networks and their affiliated stations to restrict competi-

tion. Yet, these stations are the beneficiaries of government licenses under an Act founded on the principle of competition over the air. If a network can thus make contractual provisions a substitute for superiority in the market place, its incentive to furnish the best programs will be correspondingly diminished. At the same time there will continue to be privately promulgated blackouts in whole areas on desirable broadcasts. In the final analysis, such clauses are reminiscent of the exclusive dealing arrangements condemned by the Clayton Act. How much more dangerous are such contracts when entered into by dealers in ideas, especially when their number is limited not by the ordinary interplay of the forces of competition but by scientific necessity. Such contractual devices to keep programs from being available to large segments of the listening public are not supported by any considerations of public interest.

3.103

The third of the challenged Regulations provides that no station shall be licensed which makes a contract of affiliation with a network binding it for more than two years. Clearly the purpose of the typical N. B. C. and C. B. S. provision binding their affiliated stations for five years was to restrain competition among networks in the acquisition of affiliates. These long-term contracts are especially destructive of diversity since they contain the other contractual provisions also frowned upon by the Regulations. By these contracts the networks have the power to dominate their local affiliates for five years and to this extent the local stations have abdicated their responsibility for independent program selection. The five-year arrangement is particularly anomalous because station licenses are only granted for a period of two years and the networks themselves are typically bound only for one year by their contracts with affiliates.

3.104 and 3.105

The abdication of that local responsibility which is an indispensable earmark of diversity, is further marked by the so-called option time provisions in network affiliation contracts, provisions condemned by Regulation 3.104. Under these clauses the networks may on 28 days' notice clear off local stations, during the most important broadcast hours of the day, programs which those stations have selected and substitute therefor programs which the networks have seen fit to contract for. The typical option time provisions mean that any program of a local affiliate presumably selected by it because deemed of local value is subject to cancellation on 28 days' notice in favor of any program contracted for by the national network without regard for local needs. The networks have maintained that such clauses are necessary if radio is to compete with other national advertising media. The amended Regulations of the Commission take this contention into account: they divide the broadcast day into four parts and require that local stations reserve to themselves at least two hours in every part. As additional protection to the local stations, the Commission is requiring that the period of notice be extended from 28 to 56 days, and it is stipulated that the options can be exercised only to remove non-network broadcasts but may not be used to displace the programs of other networks already contracted for. It is submitted that if the option time provisions now in standard affiliation contracts are not modified at least as much as the Regulations of the Commission would call for, the local audience radio fare will be determined by the power of New York groups acting without regard to specific local needs. In market terms these option clauses are the equivalent of stock market "puts." The more successful the networks in obtaining advertising contracts, the

fewer the minds selecting the material which issues from the microphones of the country.

As a corollary to the Regulation cutting down on option time provisions, the Federal Communications Commission by Regulation 3.105 enunciates the principle that stations must reserve the right under their affiliation contracts to reject unsatisfactory and unsuitable programs. This is another move to prevent abdication of responsibility.

3.106

The sixth of the challenged Regulations (3.106) prescribes a policy against one network having more than one station in the same area or any station at all in an area where competition would be substantially restrained by network ownership of a station.

Operation by the same entity of more than one station in the same area cuts down on a diversity already sharply limited by mechanical necessity. Unless the Commission has power to avert multiple ownership in the same area, there is a further invitation toward the gradual swallowing up of more and more individual stations by a few networks. In those localities where the available stations are too few or too weak adequately to serve local interests certainly public policy requires that the station licenses be not granted to absentee landlords, to whom the station would be a mere link in a chain rather than an entity in itself.

The remaining two Regulations Numbers 3.107 and 3.108 are not realistically involved in this proceeding.

POINT II

The challenged Regulations are within the statutory authority of the Commission.

The policies declared by the Federal Communications Commission in the Regulations at bar are thus designed in each instance to dilute concentration of control over the radio spectrum, thereby promoting diversity in the communication of ideas by means of the radio. The ultimate question of law is whether the Federal Communications Commission has authority under its constitutive Act to posit increased competition and diversity as one at least of the major criteria in its supervision of the air waves. We think, as did the Court below, that that question must be answered in the affirmative.

Focal to the entire Act is the licensing power. Congress has declared that it should be exercised in the light of "public interest, convenience or necessity" (§309 (a)). This criterion, while not "so indefinite as to confer an unlimited power,"* has a "flexibility"† which must be taken into account when the question is whether the agents of Congress have so far exceeded their power as to call for judicial veto.

It is moreover established that the "interest, convenience or necessity" which is to be served by the Commission is that of the "public," not that of the owners of radio stations and certainly not that of broadcasting chains which merely purvey services to the radio stations. This principle is illuminated by *Federal Communications Comm. v. Sanders Bros.*, 309 U. S. 470, 475, where Mr. Justice ROBERTS remarked that "Plainly it is not the pur-

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* HUGHES, C.J., in *Federal Radio Comm. v. Nelson Bros. B & M Co.*, 289 U. S. 266, 285.

† FRANKFURTER, J., in *Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 138.

pose of the Act to protect a licensee against competition but to protect the public."

With its eye single to the *public* interest, and with a wide range of discretion in selecting means for safeguarding that interest, the Commission could validly determine that a larger degree of competition is essential to the public interest, that certain existing practices tend unduly to stifle diversity, and that abandonment of these practices should be made a condition of the grant of the privilege to use a facility in the public demesne.

This conclusion is reinforced by the basic structure of the Act as well as a plenitude of particular provisions. Congress could have declared radio stations to be public carriers and thereupon impressed comprehensive regulation on most, if not all, of their activities (including the rates they charge) as a substitute for the correctives of competition. It preferred to rely upon the correctives of competition. But this was necessarily based on the assumption that competition would be as free as the scientific necessities of the industry permit. And the Commission was implicitly charged with the duty of maintaining that freedom. See Federal Communications Act, §§151, 153 (b), 301, 303 (g), (i), 304, 307 (b), (d), 309 (a), (b) (1) (2), 310 (b), 311, 312, 313, 314. We have seen above that the policies towards stimulating competition (and therefore diversity of expression) implicit in the Regulations are not extravagant or extreme; they are paralleled by the traditional policies of our anti-trust laws and by the host of modern legislative approaches to problems of concentration of control such as interlocking directorates, ownership by banks of security affiliates, public utility holding companies, etc. Finally, the Commission does not intend to enforce its policies as wooden rules of thumb. It has declared its intention to mitigate these policies

in particular situations where the facts warrant or require it. Thus in its opinion on rehearing (October 11, 1941) the Commission said:

> "The Commission stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances the chain broadcasting regulations should not be applicable to any particular situation."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 554-555.—October Term, 1942.

National Broadcasting Company, Inc., and Stromberg-Carlson Telephone Manufacturing Company, Appellants,
554 *vs.*
The United States of America, Federal Communications Commission, and Mutual Broadcasting System, Inc.

Columbia Broadcasting System, Inc., Appellant,
555 *vs.*
The United States of America, Federal Communications Commission, and Mutual Broadcasting System, Inc.

Appeals from the District Court of the United States for the Southern District of New York.

[May 10, 1943.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In view of our dependence upon regulated private enterprise in discharging the far-reaching rôle which radio plays in our society, a somewhat detailed exposition of the history of the present controversy and the issues which it raises is appropriate.

These suits were brought on October 30, 1941, to enjoin the enforcement of the Chain Broadcasting Regulations promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941. We held last Term in *Columbia System* v. *U. S.*, 316 U. S. 407, and *Nat. Broadcasting Co.* v. *U. S.*, 316 U. S. 447, that the suits could be maintained under § 402(a) of the Communications Act of 1934, 48 Stat. 1093, 47 U. S. C. § 402(a) (incorporating by reference the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 28 U. S. C. § 47), and that the decrees of the District Court dismissing the suits for want of jurisdiction should therefore be reversed. On remand the District Court granted the Government's motions for summary judgment

and dismissed the suits on the merits. 47 F. Supp. 940. The cases are now here on appeal. 28 U. S. C. § 47. Since they raise substantially the same issues and were argued together, we shall deal with both cases in a single opinion.

On March 18, 1938, the Commission undertook a comprehensive investigation to determine whether special regulations applicable to radio stations engaged in chain broadcasting[1] were required in the "public interest, convenience, or necessity". The Commission's order directed that inquiry be made, *inter alia*, in the following specific matters: the number of stations licensed to or affiliated with networks, and the amount of station time used or controlled by networks; the contractual rights and obligations of stations under their agreements with networks; the scope of network agreements containing exclusive affiliation provisions and restricting the network from affiliating with other stations in the same area; the rights and obligations of stations with respect to network advertisers; the nature of the program service rendered by stations licensed to networks; the policies of networks with respect to character of programs, diversification, and accommodation to the particular requirements of the areas served by the affiliated stations; the extent to which affiliated stations exercise control over programs, advertising contracts, and related matters; the nature and extent of network program duplication by stations serving the same area; the extent to which particular networks have exclusive coverage in some areas; the competitive practices of stations engaged in chain broadcasting; the effect of chain broadcasting upon stations not licensed to or affiliated with networks; practices or agreements in restraint of trade, or in furtherance of monopoly, in connection with chain broadcasting; and the scope of concentration of control over stations, locally, regionally, or nationally, through contracts, common ownership, or other means.

On April 6, 1938, a committee of three Commissioners was designated to hold hearings and make recommendations to the full Commission. This committee held public hearings for 73 days over a period of six months, from November 14, 1938, to May 19, 1939. Order No. 37, announcing the investigation and specifying

[1] Chain broadcasting is defined in § 3(p) of the Communications Act of 1934 as the "simultaneous broadcasting of an identical program by two or more connected stations". In actual practice, programs are transmitted by wire, usually leased telephone lines, from their point of origination to each station in the network for simultaneous broadcast over the air.

the particular matters which would be explored at the hearings, was published in the Federal Register, 3 Fed. Reg. 637, and copies were sent to every station licensee and network organization. Notices of the hearings were also sent to these parties. Station licensees, national and regional networks, and transcription and recording companies were invited to appear and give evidence. Other persons who sought to appear were afforded an opportunity to testify. 96 witnesses were heard by the committee, 45 of whom were called by the national networks. The evidence covers 27 volumes, including over 8,000 pages of transcript and more than 700 exhibits. The testimony of the witnesses called by the national networks fills more than 6,000 pages, the equivalent of 46 hearing days.

The committee submitted a report to the Commission on June 12, 1940, stating its findings and recommendations. Thereafter, briefs on behalf of the networks and other interested parties were filed before the full Commission, and on November 28, 1940, the Commission issued proposed regulations which the parties were requested to consider in the oral arguments held on December 2 and 3, 1940. These proposed regulations dealt with the same matters as those covered by the regulations eventually adopted by the Commission. On January 2, 1941, each of the national networks filed a supplementary brief discussing at length the questions raised by the committee report and the proposed regulations.

On May 2, 1941, the Commission issued its Report on Chain Broadcasting, setting forth its findings and conclusions upon the matters explored in the investigation, together with an order adopting the Regulations here assailed. Two of the seven members of the Commission dissented from this action. The effective date of the Regulations was deferred for 90 days with respect to existing contracts and arrangements of network-operated stations, and subsequently the effective date was thrice again postponed. On August 14, 1941, the Mutual Broadcasting Company petitioned the Commission to amend two of the Regulations. In considering this petition the Commission invited interested parties to submit their views. Briefs were filed on behalf of all of the national networks, and oral argument was had before the Commission on September 12, 1941. And on October 11, 1941, the Commission (again with two members dissenting) issued a Supplemental Report, together with an order amending three Regulations. Simultaneously, the effective date of the Regulations

was postponed until November 15, 1941, and provision was made for further postponements from time to time if necessary to permit the orderly adjustment of existing arrangements. Since October 30, 1941, when the present suits were filed, the enforcement of the Regulations has been stayed either voluntarily by the Commission or by order of court.

Such is the history of the Chain Broadcasting Regulations. We turn now to the Regulations themselves, illumined by the practices in the radio industry disclosed by the Commission's investigation. The Regulations, which the Commission characterized in its Report as "the expression of the general policy we will follow in exercising our licensing power", are addressed in terms to station licensees and applicants for station licenses. They provide, in general, that no licenses shall be granted to stations or applicants having specified relationships with networks. Each Regulation is directed at a particular practice found by the Commission to be detrimental to the "public interest", and we shall consider them *seriatim*. In doing so, however, we do not overlook the admonition of the Commission that the Regulations as well as the network practices at which they are aimed are interrelated: "In considering above the network practices which necessitate the regulations we are adopting, we have taken each practice singly, and have shown that even in isolation each warrants the regulation addressed to it. But the various practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each taken singly." (Report, p. 75.)

The Commission found that at the end of 1938 there were 660 commercial stations in the United States, and that 341 of these were affiliated with national networks. 135 stations were affiliated exclusively with the National Broadcasting Company, Inc., known in the industry as NBC, which operated two national networks, the "Red" and the "Blue". NBC was also the licensee of 10 stations, including 7 which operated on so-called clear channels with the maximum power available, 50 kilowatts; in addition, NBC operated 5 other stations, 4 of which had power of 50 kilowatts, under management contracts with their licensees. 102 stations were affiliated exclusively with the Columbia Broadcasting System, Inc., which was also the licensee of 8 stations, 7 of which were clear-channel stations operating with power of 50 kilowatts.

74 stations were under exclusive affiliation with the Mutual Broadcasting System, Inc. In addition, 25 stations were affiliated with both NBC and Mutual, and 5 with both CBS and Mutual. These figures, the Commission noted, did not accurately reflect the relative prominence of the three companies; since the stations affiliated with Mutual were, generally speaking, less desirable in frequency, power, and coverage. It pointed out that the stations affiliated with the national networks utilized more than 97% of the total night-time broadcasting power of all the stations in the country. NBC and CBS together controlled more than 85% of the total night-time wattage, and the broadcast business of the three national network companies amounted to almost half of the total business of all stations in the United States.

The Commission recognized that network broadcasting had played and was continuing to play an important part in the development of radio. "The growth and development of chain broadcasting", it stated, "found its impetus in the desire to give widespread coverage to programs which otherwise would not be heard beyond the reception area of a single station. Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin. Furthermore, the access to greatly enlarged audiences made possible by chain broadcasting has been a strong incentive to advertisers to finance the production of expensive programs. . . . But the fact that the chain broadcasting method brings benefits and advantages to both the listening public and to broadcast station licensees does not mean that the prevailing practices and policies of the networks and their outlets are sound in all respects, or that they should not be altered. The Commission's duty under the Communications Act of 1934 is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated." (Report, p. 4.)

The Commission found that eight network abuses were amenable to correction within the powers granted it by Congress:

Regulation 3.101—Exclusive affiliation of station. The Commission found that the network affiliation agreements of NBC and CBS customarily contained a provision which prevented the sta-

tion from broadcasting the programs of any other network. The effect of this provision was to hinder the growth of new networks, to deprive the listening public in many areas of service to which they were entitled, and to prevent station licensees from exercising their statutory duty of determining which programs would best serve the needs of their community. The Commission observed that in areas where all the stations were under exclusive contract to either NBC or CBS, the public was deprived of the opportunity to hear programs presented by Mutual. To take a case cited in the Report: In the fall of 1939 Mutual obtained the exclusive right to broadcast the World Series baseball games. It offered this program of outstanding national interest to stations throughout the country, including NBC and CBS affiliates in communities having no other stations. CBS and NBC immediately invoked the "exclusive affiliation" clauses of their agreements with these stations, and as a result thousands of persons in many sections of the country were unable to hear the broadcasts of the games.

"Restraints having this effect", the Commission observed, "are to be condemned as contrary to the public interest irrespective of whether it be assumed that Mutual programs are of equal, superior, or inferior quality. The important consideration is that station licensees are denied freedom to choose the programs which they believe best suited to their needs; in this manner the duty of a station licensee to operate in the public interest is defeated. . . . Our conclusion is that the disadvantages resulting from these exclusive arrangements far outweigh any advantages. A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable, and which, by closing the door of opportunity in the network field, adversely affect the program structure of the entire industry." (Report, pp. 52, 57.) Accordingly, the Commission adopted Regulation 3.101, providing as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization."

Regulation 3.102—Territorial exclusivity. The Commission found another type of "exclusivity" provision in network affiliation

agreements whereby the network bound itself not to sell programs to any other station in the same area. The effect of this provision, designed to protect the affiliate from the competition of other stations serving the same territory, was to deprive the listening public of many programs that might otherwise be available. If an affiliated station rejected a network program, the "territorial exclusivity" clause of its affiliation agreement prevented the network from offering the program to other stations in the area. For example, Mutual presented a popular program, known as "The American Forum of the Air", in which prominent persons discussed topics of general interest. None of the Mutual stations in the Buffalo area decided to carry the program, and a Buffalo station not affiliated with Mutual attempted to obtain the program for its listeners. These efforts failed, however, on account of the "territorial exclusivity" provision in Mutual's agreements with its outlets. The result was that this program was not available to the people of Buffalo.

The Commission concluded that "It is not in the public interest for the listening audience in an area to be deprived of network programs not carried by one station where other stations in that area are ready and willing to broadcast the programs. It is as much against the public interest for a network affiliate to enter into a contractual arrangement which prevents another station from carrying a network program as it would be for it to drown out that program by electrical interference." (Report, p. 59.)

Recognizing that the "territorial exclusivity" clause was unobjectionable in so far as it sought to prevent duplication of programs in the same area, the Commission limited itself to the situations in which the clause impaired the ability of the licensee to broadcast programs otherwise available. Regulation 3.102, promulgated to remedy this particular evil, provides as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call

in its primary service area upon the programs of the network organization."

Regulation 3.103—Term of affiliation. The standard NBC and CBS affiliation contracts bound the station for a period of five years, with the network having the exclusive right to terminate the contracts upon one year's notice. The Commission, relying upon § 307(d) of the Communications Act of 1934, under which no license to operate a broadcast station can be granted for a longer term than three years, found the five-year affiliation term to be contrary to the policy of the Act: "Regardless of any changes that may occur in the economic, political, or social life of the Nation or of the community in which the station is located, CBS and NBC affiliates are bound by contract to continue broadcasting the network programs of only one network for 5 years. The licensee is so bound even though the policy and caliber of programs of the network may deteriorate greatly. The future necessities of the station and of the community are not considered. The station licensee is unable to follow his conception of the public interest until the end of the 5-year contract." (Report, p. 61.) The Commission concluded that under contracts binding the affiliates for five years, "stations become parties to arrangements which deprive the public of the improved service it might otherwise derive from competition in the network field; and that a station is not operating in the public interest when it so limits its freedom of action." (Report, p. 62.) Accordingly, the Commission adopted Regulation 3.103: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years:[2] *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period."

Regulation 3.104—Option time. The Commission found that network affiliation contracts usually contained so-called network optional time clauses. Under these provisions the network could upon 28 days' notice call upon its affiliates to carry a commercial

[2] Station licenses issued by the Commission normally last two years. Section 3.34 of the Commission's Rules and Regulations governing Standard and High-Frequency Broadcast Stations, as amended October 14, 1941.

program during any of the hours specified in the agreement as "network optional time". For CBS affiliates "network optional time" meant the entire broadcast day. For 29 outlets of NBC on the Pacific Coast, it also covered the entire broadcast day; for substantially all of the other NBC affiliates, it included 8½ hours on weekdays and 8 hours on Sundays. Mutual's contracts with about half of its affiliates contained such a provision, giving the network optional time for 3 or 4 hours on weekdays and 6 hours on Sundays.

In the Commission's judgment these optional time provisions, in addition to imposing serious obstacles in the path of new networks, hindered stations in developing a local program service. The exercise by the networks of their options over the station's time tended to prevent regular scheduling of local programs at desirable hours. The Commission found that "shifting a local commercial program may seriously interfere with the efforts of a [local] sponsor to build up a regular listening audience at a definite hour, and the long-term advertising contract becomes a highly dubious project. This hampers the efforts of the station to develop local commercial programs and affects adversely its ability to give the public good program service . . . . A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest. We conclude that national network time options have restricted the freedom of station licensees and hampered their efforts to broadcast local commercial programs, the programs of other national networks, and national spot transcriptions. We believe that these considerations far outweigh any supposed advantages from 'stability' of network operations under time options. We find that the optioning of time by licensee stations has operated against the public interest." (Report, pp. 63, 65.)

The Commission undertook to preserve the advantages of option time, as a device for "stabilizing" the industry, without unduly impairing the ability of local stations to develop local program service. Regulation 3.104 called for the modification of the option-

time provision in three respects: the minimum notice period for exercise of the option could not be less than 56 days; the number of hours which could be optioned was limited; and specific restrictions were placed upon exercise of the option to the disadvantage of other networks. The text of the Regulation follows: "No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a.m. to 1:00 p.m.; 1:00 p.m. to 6:00 p.m.; 6:00 p.m. to 11:00 p.m.; 11:00 p.m. to 8:00 a.m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

Regulation 3.105—Right to reject programs. The Commission found that most network affiliation contracts contained a clause defining the right of the station to reject network commercial programs. The NBC contracts provided simply that the station "may reject a network program the broadcasting of which would not be in the public interest, convenience, and necessity." NBC required a licensee who rejected a program to "be able to support his contention that what he has done has been more in the public interest than had he carried on the network program". Similarly, the CBS contracts provided that if the station had "reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest, the station may, on 3 weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the station shall be satisfied".

While seeming in the abstract to be fair, these provisions, according to the Commission's finding, did not sufficiently protect the "public interest". As a practical matter, the licensee could not determine in advance whether the broadcasting of any particular network program would or would not be in the public interest. "It is obvious that from such skeletal information [as the networks submitted to the stations prior to the broadcasts] the station cannot determine in advance whether the program is in the public interest, nor can it ascertain whether or not parts of the program are in one way or another offensive. In practice,

if not in theory, stations affiliated with networks have delegated to the networks a large part of their programming functions. In many instances, moreover, the network further delegates the actual production of programs to advertising agencies. These agencies are far more than mere brokers or intermediaries between the network and the advertiser. To an ever-increasing extent, these agencies actually exercise the function of program production. Thus it is frequently neither the station nor the network, but rather the advertising agency, which determines what broadcast programs shall contain. Under such circumstances, it is especially important that individual stations, if they are to operate in the public interest, should have the practical opportunity as well as the contractual right to reject network programs. . . . .

"It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communcations Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory." (Report, pp. 39, 66.)

The Commission undertook in Regulation 3.105 to formulate the obligations of licensees with respect to supervision over programs: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance."

Regulation 3.106—Network ownership of stations. The Commission found that NBC, in addition to its network operations, was the licensee of 10 stations, 2 each in New York, Chicago, Washington, and San Francisco, 1 in Denver, and 1 in Cleveland. CBS was the licensee of 8 stations, 1 in each of these cities: New York, Chicago, Washington, Boston, Minneapolis, St. Louis, Charlotte, and Los Angeles. These 18 stations owned by NBC and CBS, the Commission observed, were among the most powerful and desirable in the country, and were permanently inaccessible to competing networks. "Competition among networks for these facilities is nonexistent, as they are completely removed from the network-station market. It gives the network complete control over its policies. This 'bottling-up' of the best facilities has undoubtedly had a discouraging effect upon the creation and growth of new networks. Furthermore, common ownership of network and station places the network in a position where its interest as the owner of certain stations may conflict with its interest as a network organization serving affiliated stations. In dealings with advertisers, the network represents its own stations in a proprietary capacity and the affiliated stations in something akin to an agency capacity. The danger is present that the network organization will give preference to its own stations at the expense of its affiliates." (Report, p. 67.)

The Commission stated that if the question had arisen as an original matter, it might well have concluded that the public interest required severance of the business of station ownership from that of network operation. But since substantial business interests have been formed on the basis of the Commission's continued tolerance of the situation, it was found inadvisable to take such a drastic step. The Commission concluded, however, that "the licensing of two stations in the same area to a single network organization is basically unsound and contrary to the public interest", and that it was also against the "public interest" for network organizations to own stations in areas where the available facilities were so few or of such unequal coverage that competition would thereby be substantially restricted. Recognizing that these considerations called for flexibility in their application to particular situations, the Commission provided that "networks will be given full opportunity, on proper application for new facilities or renewal of existing licenses, to call to our attention any reasons why

the principle should be modified or held inapplicable." (Report, p. 68.) Regulation 3.106 reads as follows: "No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

Regulation 3.107—Dual network operation. This regulation provides that: "No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network." In its Supplemental Report of October 11, 1941, the Commission announced the indefinite suspension of this regulation. There is no occasion here to consider the validity of Regulation 3.107, since there is no immediate threat of its enforcement by the Commission.

Regulation 3.108—Control by networks of station rates. The Commission found that NBC's affiliation contracts contained a provision empowering the network to reduce the station's network rate, and thereby to reduce the compensation received by the station, if the station set a lower rate for non-network national advertising than the rate established by the contract for the network programs. Under this provision the station could not sell time to a national advertiser for less than it would cost the advertiser if he bought the time from NBC. In the words of NBC's vice-president, "This means simply that a national advertiser should pay the same price for the station whether he buys it through one source or another source. It means that we do not believe that our stations should go into competition with ourselves." (Report, p. 73.)

The Commission concluded that "it is against the public interest for a station licensee to enter into a contract with a network which has the effect of decreasing its ability to compete for national business. We believe that the public interest will best be served and listeners supplied with the best programs if stations bargain freely

with national advertisers." (Report, p. 75.) Accordingly, the Commission adopted Regulation 3.108, which provides as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs."

The appellants attack the validity of these Regulations along many fronts. They contend that the Commission went beyond the regulatory powers conferred upon it by the Communications Act of 1934; that even if the Commission were authorized by the Act to deal with the matters comprehended by the Regulations, its action is nevertheless invalid because the Commission misconceived the scope of the Act, particularly § 313 which deals with the application of the anti-trust laws to the radio industry; that the Regulations are arbitrary and capricious; that if the Communications Act of 1934 were construed to authorize the promulgation of the Regulations, it would be an unconstitutional delegation of legislative power; and that, in any event, the Regulations abridge the appellants' right of free speech in violation of the First Amendment. We are thus called upon to determine whether Congress has authorized the Commission to exercise the power asserted by the Chain Broadcasting Regulations, and if it has, whether the Constitution forbids the exercise of such authority.

Federal regulation of radio[3] begins with the Wireless Ship Act of June 24, 1910, 36 Stat. 629, which forbade any steamer carrying or licensed to carry fifty or more persons to leave any American port unless equipped with efficient apparatus for radio communication, in charge of a skilled operator. The enforcement of this legislation was entrusted to the Secretary of Commerce and Labor, who was in charge of the administration of the marine navigation laws. But it was not until 1912, when the United

[3] The history of federal regulation of radio communication is summarized in Herring and Gross, Telecommunications (1936) 239-86; Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 186, 76th Cong., 3d Sess., Part 3, dealing with the Federal Communications Commission, pp. 82-84; 1 Socolow, Law of Radio Broadcasting (1939) 38-61; Donovan, Origin and Development of Radio Law (1930).

States ratified the first international radio treaty, 37 Stat. 1565, that the need for general regulation of radio communication became urgent. In order to fulfill our obligations under the treaty, Congress enacted the Radio Act of August 13, 1912, 37 Stat. 302. This statute forbade the operation of radio apparatus without a license from the Secretary of Commerce and Labor; it also allocated certain frequencies for the use of the Government, and imposed restrictions upon the character of wave emissions, the transmission of distress signals, and the like.

The enforcement of the Radio Act of 1912 presented no serious problems prior to the World War. Questions of interference arose only rarely because there were more than enough frequencies for all the stations then in existence. The war accelerated the development of the art, however, and in 1921 the first standard broadcast stations were established. They grew rapidly in number, and by 1923 there were several hundred such stations throughout the country. The Act of 1912 had not set aside any particular frequencies for the use of private broadcast stations; consequently, the Secretary of Commerce selected two frequencies, 750 and 833 kilocycles, and licensed all stations to operate upon one or the other of these channels. The number of stations increased so rapidly, however, and the situation became so chaotic, that the Secretary, upon the recommendation of the National Radio Conferences which met in Washington in 1923 and 1924, established a policy of assigning specified frequencies to particular stations. The entire radio spectrum was divided into numerous bands, each allocated to a particular kind of service. The frequencies ranging from 550 to 1500 kilocycles (96 channels in all, since the channels were separated from each other by 10 kilocycles) were assigned to the standard broadcast stations. But the problems created by the enormously rapid development of radio were far from solved. The increase in the number of channels was not enough to take care of the constantly growing number of stations. Since there were more stations than available frequencies, the Secretary of Commerce attempted to find room for everybody by limiting the power and hours of operation of stations in order that several stations might use the same channel. The number of stations multiplied so rapidly, however, that by November, 1925, there were almost 600 stations in the country, and there were 175 applications for new stations. Every channel in the standard broadcast band was, by that time, already occupied by at least one station, and

many by several. The new stations could be accommodated only by extending the standard broadcast band, at the expense of the other types of services, or by imposing still greater limitations upon time and power. The National Radio Conference which met in November, 1925, opposed both of these methods and called upon Congress to remedy the situation through legislation.

The Secretary of Commerce was powerless to deal with the situation. It had been held that he could not deny a license to an otherwise legally qualified applicant on the ground that the proposed station would interfere with existing private or Government stations. *Hoover* v. *Intercity Radio Co.*, 286 Fed. 1003. And on April 16, 1926, an Illinois district court held that the Secretary had no power to impose restrictions as to frequency, power, and hours of operation, and that a station's use of a frequency not assigned to it was not a violation of the Radio Act of 1912. *United States* v. *Zenith Radio Corp.*, 12 F. 2d 614. This was followed on July 8, 1926, by an opinion of Acting Attorney General Donovan that the Secretary of Commerce had no power, under the Radio Act of 1912, to regulate the power, frequency or hours of operation of stations. 35 Ops. Atty. Gen. 126. The next day the Secretary of Commerce issued a statement abandoning all his efforts to regulate radio and urging that the stations undertake self-regulation.

But the plea of the Secretary went unheeded. From July, 1926, to February 23, 1927, when Congress enacted the Radio Act of 1927, 44 Stat. 1162, almost 200 new stations went on the air. These new stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard. The situation became so intolerable that the President in his message of December 7, 1926, appealed to Congress to enact a comprehensive radio law:

> "Due to the decisions of the courts, the authority of the department [of Commerce] under the law of 1912 has broken down; many more stations have been operating than can be accommodated within the limited number of wave lengths available; further stations are in course of construction; many stations have departed from the scheme of allocations set down by the department, and the whole service of this most important public function has drifted into such chaos as

seems likely, if not remedied, to destroy its great value. I most urgently recommend that this legislation should be speedily enacted." (H. Doc. 483, 69th Cong., 2d Sess., p. 10.)

The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another.[4] Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile. In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communication, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential.

The Radio Act of 1927 created the Federal Radio Commission, composed of five members, and endowed the Commission with wide licensing and regulatory powers. We do not pause here to enumerate the scope of the Radio Act of 1927 and of the authority entrusted to the Radio Commission, for the basic provisions of that Act are incorporated in the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 151 *et seq.*, the legislation immediately before us. As we noted in *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, "In its essentials the Communications Act of 1934 [so far as its provisions relating to radio are concerned] derives from the Federal Radio Act of 1927. . . . By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927."

Section 1 of the Communications Act states its "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and

[4] See Morecroft, Principles of Radio Communication (3d ed. 1933) 355-402; Terman, Radio Engineering (2d ed. 1937) 593-645.

world-wide wire and radio communication service with adequate facilities at reasonable charges". Section 301 particularizes this general purpose with respect to radio: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." To that end a Commission composed of seven members was created, with broad licensing and regulatory powers.

Section 303 provides:

> "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> (a) Classify radio stations;
>
> (b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;
>
> . . . . . .
>
> (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act . . .;
>
> (g) Study new uses for radio, provid for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;
>
> . . . . . .
>
> (i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;
>
> . . . . . .
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . . ."

The criterion governing the exercise of the Commission's licensing power is the "public interest, convenience, or necessity". §§ 307(a)(d), 309(a), 310, 312. In addition, § 307(b) directs the Commission that "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity", a criterion which "is as concrete as the complicated factors for judgment in such a field of delegated authority permit". *Federal Communications Comm'n.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138. "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services . . . ." *Radio Comm'n.* v. *Nelson Bros. Co.*, 289 U. S. 266, 285.

The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio". § 303(g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Federal Communications Comm'n.* v. *Sanders Radio Station*, 309 U. S. 470, 475. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the applica-

tion of the standard of "public interest, convenience, or necessity". *See Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 n. 2.

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303(g) provides that the Commission shall "generally encourage the larger and more effective use of radio in the public interest"; subsection (i) gives the Commission specific "authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and subsection (r) empowers it to adopt "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act".

These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest". We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

In essence, the Chain Broadcasting Regulations represent a particularization of the Commission's conception of the "public interest" sought to be safeguarded by Congress in enacting the

Communications Act of 1934. The basic consideration of policy underlying the Regulations is succinctly stated in its Report: "With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. . . . The net effect [of the practices disclosed by the investigation] has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging 'the larger and more effective use of radio in the public interest' if we were to grant licenses to persons who persist in these practices." (Report, pp. 81, 82.)

We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations. True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *Federal Communications Comm'n.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137. In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. It was given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest", if need be, by making "special regulations applicable to radio stations engaged in chain broadcasting". §303(g)(i).

Generalities unrelated to the living problems of radio communication of course cannot justify exercises of power by the Commission. Equally so, generalities empty of all concrete considerations of the actual bearing of regulations promulgated by the Commission to the subject-matter entrusted to it, cannot strike down exercises of power by the Commission. While Con-

gress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

For the cramping construction of the Act pressed upon us, support cannot be found in its legislative history. The principal argument is that § 303(i), empowering the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting", intended to restrict the scope of the Commission's powers to the technical and engineering aspects of chain broadcasting. This provision comes from § 4(h) of the Radio Act of 1927. It was introduced into the legislation as a Senate committee amendment to the House bill (H. R. 9971, 69th Cong., 1st Sess.) This amendment originally read as follows:

> "(C) The commission, from time to time, as public convenience, interest, or necessity requires, shall—
>
> . . . . . .
>
> (j) When stations are connected by wire for chain broadcasting, determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting."

The report of the Senate Committee on Interstate Commerce, which submitted this amendment, stated that under the bill the Commission was given "complete authority . . . to control chain broadcasting." Sen. Rep. No. 772, 69th Cong., 1st Sess., p. 3. The bill as thus amended was passed by the Senate, and then sent to conference. The bill that emerged from the conference

committee, and which became the Radio Act of 1927, phrased the amendment in the general terms now contained in § 303(i) of the 1934 Act: the Commission was authorized "to make special regulations applicable to radio stations engaged in chain broadcasting". The conference reports do not give any explanation of this particular change in phrasing, but they do state that the jurisdiction conferred upon the Commission by the conference bill was substantially identical with that conferred by the bill passed by the Senate. See Sen. Doc. No. 200, 69th Cong., 2d Sess., p. 17; H. Rep. 1886, 69th Cong., 2d Sess., p. 17. We agree with the District Court that in view of this legislative history, § 303(i) cannot be construed as no broader than the first clause of the Senate amendment, which limited the Commission's authority to the technical and engineering phases of chain broadcasting. There is no basis for assuming that the conference intended to preserve the first clause, which was of limited scope, and abandon the second clause, which was of general scope, by agreeing upon a provision which was broader and more comprehensive than those it supplanted.[5]

A totally different source of attack upon the Regulations is found in § 311 of the Act, which authorizes the Commission to withhold licenses from persons convicted of having violated the anti-trust laws. Two contentions are made—first, that this provision puts considerations relating to competition outside the Commission's concern before an applicant has been convicted

[5] In the course of the Senate debates on the conference report upon the bill that became the Radio Act of 1927, Senator Dill, who was in charge of the bill, said: "While the commission would have the power under the general terms of the bill, the bill specifically sets out as one of the special powers of the commission the right to make specific regulations for governing chain broadcasting. As to creating a monopoly of radio in this country, let me say that this bill absolutely protects the public, so far as it can protect them, by giving the commission full power to refuse a license to anyone who it believes will not serve the public interest, convenience, or necessity. It specifically provides that any corporation guilty of monopoly shall not only not receive a license but that its license may be revoked; and if after a corporation has received its license for a period of three years it is then discovered and found to be guilty of monopoly, its license will be revoked. . . . In addition to that, the bill contains a provision that no license may be transferred from one owner to another without the written consent of the commission, and the commission, of course, having the power to protect against a monopoly, must give such protection. I wish to state further that the only way by which monopolies in the radio business can secure control of radio here, even for a limited period of time, will be by the commission becoming servile to them. Power must be lodged somewhere, and I myself am unwilling to assume in advance that the commission proposed to be created will be servile to the desires and demands of great corporations of this country." 68 Cong. Rec. 2881.

of monopoly or other restraints of trade, and second, that in any event, the Commission misconceived the scope of its powers under § 311 in issuing the Regulations. Both of these contentions are unfounded. Section 311 derives from § 13 of the Radio Act of 1927, which expressly commanded, rather than merely authorized, the Commission to refuse a license to any person judicially found guilty of having violated the anti-trust laws. The change in the 1934 Act was made, in the words of Senator Dill, the manager of the legislation in the Senate, because "it seemed fair to the committee to do that". 78 Cong. Rec. 8825. The Commission was thus permitted to exercise its judgment as to whether violation of the anti-trust laws disqualified an applicant from operating a station in the "public interest". We agree with the District Court that "The necessary implication from this [amendment in 1934] was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee." 47 F. Supp. 940, 944.

That the Commission may refuse to grant a license to persons adjudged guilty in a court of law of conduct in violation of the anti-trust laws certainly does not render irrelevant consideration by the Commission of the effect of such conduct upon the "public interest, convenience, or necessity". A licensee charged with practices in contravention of this standard cannot continue to hold his license merely because his conduct is also in violation of the anti-trust laws and he has not yet been proceeded against and convicted. By clarifying in § 311 the scope of the Commission's authority in dealing with persons convicted of violating the anti-trust laws, Congress can hardly be deemed to have limited the concept of "public interest" so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce. Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the "public interest", merely because its misconduct happened to be an unconvicted violation of the anti-trust laws.

Alternatively, it is urged that the Regulations constitute an *ultra vires* attempt by the Commission to enforce the anti-trust laws, and that the enforcement of the anti-trust laws is the province not of the Commission but of the Attorney General and

the courts. This contention misconceives the basis of the Commission's action. The Commission's Report indicates plainly enough that the Commission was not attempting to administer the antitrust laws:

"The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. . . . While many of the network practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals. . . . We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest." (Report, pp. 46, 83, 83n. 3.)

We conclude, therefore, that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting. There remains for consideration the claim that the Commission's exercise of such authority was unlawful.

The Regulations are assailed as "arbitrary and capricious". If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in *Board of Trade* v. *United States*, 314 U. S. 534, 548, is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.

It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations. Its long investigation disclosed the existences of practices which it regarded as contrary to the "public interest". The Commission knew that the wisdom of any action it took would have to be tested by experience: "We are under no illusion that the regulations we are adopting will solve all questions of public interest with respect to the network system of program distribution. . . . The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial." (Report, p. 88.) The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

Since there is no basis for any claim that the Commission ~~did not fail~~ failed to observe procedural safeguards required by law, we reach the contention that the Regulations should be denied enforcement on constitutional grounds. Here, as in *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 24-25, the claim is made that the standard of "public interest" governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional. But, as we held in that case, "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary." *Ibid.* See *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 285; *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137-38. Compare *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428; *Intermountain Rate Cases*, 234 U. S. 476, 486-89; *United States* v. *Lowden*, 308 U. S. 225.

We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity". Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

A procedural point calls for just a word. The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial *de novo* of the matters heard by the Commission and dealt with in its Report would have been improper. See *Tagg Bros.* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426.

Affirmed.

Mr. Justice BLACK and Mr. Justice RUTLEDGE took no part in the consideration or decision of these cases.

Mr. Justice MURPHY, dissenting.

I do not question the objectives of the proposed regulations, and it is not my desire by narrow statutory interpretation to weaken the authority of government agencies to deal efficiently with matters committed to their jurisdiction by the Congress. Statutes of this kind should be construed so that the agency concerned may be able to cope effectively with problems which the Congress intended to correct, or may otherwise perform the functions given to it. But we exceed our competence when we gratuitously bestow upon an agency power which the Congress has not granted. Since that is what the Court in substance does today, I dissent.

In the present case we are dealing with a subject of extreme importance in the life of the nation. Although radio broadcasting, like the press, is generally conducted on a commercial basis, it is not an ordinary business activity, like the selling of securities or the marketing of electrical power. In the dissemination of information and opinion radio has assumed a position of commanding importance, rivalling the press and the pulpit. Owing to its physical characteristics radio, unlike the other methods of conveying information, must be regulated and rationed by the government. Otherwise there would be chaos, and radio's usefulness would be largely destroyed. But because of its vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it by the government is a matter of deep and vital concern. Events in Europe show that radio may readily be a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment. It may even be an instrument of oppression. In pointing out these possibilities I do not mean to intimate in the slightest that they are imminent or probable in this country, but they do suggest that the construction of the instant statute should be approached with more than ordinary restraint and caution, to avoid an interpretation that is not clearly justified by the conditions that brought about its enactment, or that would give the Commission greater powers than the Congress intended to confer.

The Communications Act of 1934 does not in terms give the Commission power to regulate the contractual relations between the stations and the networks. *Columbia System* v. *United States*, 316 U. S. 407, 416. It is only as an incident of the power to grant or withhold licenses to individual stations under §§ 307,

308, 309 and 310 that this authority is claimed,[1] except as it may have been provided by subdivisions (g), (i) and (r) of § 303, and by §§ 311 and 313. But nowhere in these sections, taken singly or collectively, is there to be found by reasonable construction or necessary inference, authority to regulate the broadcasting industry as such, or to control the complex operations of the national networks.

In providing for regulation of the radio the Congress was under the necessity of vesting a considerable amount of discretionary authority in the Commission. The task of choosing between various claimants for the privilege of using the air waves is essentially an administrative one. Nevertheless, in specifying with some degree of particularity the kind of information to be included in an application for a license, the Congress has indicated what general conditions and considerations are to govern the granting and withholding of station licenses. Thus an applicant is required by § 308(b) to submit information bearing upon his citizenship, character, and technical, financial and other qualifications to operate the proposed station, as well as data relating to the ownership and location of the proposed station, the power and frequencies desired, operating periods, intended use, and such other information as the Commission may require. Licenses, frequencies, hours of operation and power are to be fairly distributed among the several States and communities to provide efficient service to each. § 307(b). Explicit provision is made for dealing with applicants and licensees who are found guilty, or who are under the control of persons found guilty of violating the federal anti-trust laws. §§ 311 and 313. Subject to the limitations defined in the Act, the Commission is required to grant a station license to any applicant "if public convenience, interest or necessity will be served thereby". § 307(a). Nothing is said, in any of these sections, about network contracts, affiliations, or business arrangements.

The power to control network contracts and affiliations by means of the Commission's licensing powers cannot be derived from implication out of the standard of "public convenience,

[1] The regulations as first proposed were not connected with denial of applications for initial or renewal station licenses but provided instead that: "No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization", which contained any of the disapproved provisions. After a short time, however, the regulations were cast in their present form, making station licensing depend upon conformity with the regulations.

interest or necessity". We have held that: "the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel." *Commission* v. *Sanders Radio Station*, 309 U. S. 470, 475. The criterion of "public convenience, interest or necessity" is not an indefinite standard, but one to be "interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services", . . . *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 285. Nothing in the context of which the standard is a part refers to network contracts. It is evident from the record that the Comission is making its determination of whether the public interest would be served by renewal of an existing license or licenses, not upon an examination of written applications presented to it, as required by §§ 308 and 309, but upon an investigation of the broadcasting industry as a whole, and general findings made in pursuance thereof which relate to the business methods of the network companies rather than the characteristics of the individual stations and the peculiar needs of the areas served by them. If it had been the intention of the Congress to invest the Commission with the responsibility, through its licensing authority, of exercising far-reaching control —as exemplified by the proposed regulations—over the business operations of chain broadcasting and radio networks as they were then or are now organized and established, it is not likely that the Congress would have left it to mere inference or implication from the test of "public convenience, interest or necessity", or that Congress would have neglected to include it among the considerations expressly made relevant to license applications by § 308(b). The subject is one of such scope and importance as to warrant explicit mention. To construe the licensing sections (§§ 307, 308, 309, 310) as granting authority to require fundamental and revolutionary changes in the business methods of the broadcasting networks—methods which have been in existence for several years and which have not been adjudged unlawful—would inflate and distort their true meaning and extend

them beyond the limited purposes which they were intended to serve.

It is quite possible, of course, that maximum utilization of the radio as an instrument of culture, entertainment, and the diffusion of ideas is inhibited by existing network arrangements. Some of the conditions imposed by the broadcasting chains are possibly not conducive to a freer use of radio facilities, however essential they may be to the maintenance of sustaining programs and the operation of the chain broadcasting business as it is now conducted. But I am unable to agree that it is within the present authority of the Commission to prescribe the remedy for such conditions. It is evident that a correction of these conditions in the manner proposed by the regulations will involve drastic changes in the business of radio broadcasting which the Congress has not clearly and and definitely empowered the Commission to undertake.

If this were a case in which a station license had been withheld from an individual applicant or licensee because of special relations or commitments that would seriously compromise or limit his ability to provide adequate service to the listening public, I should be less inclined to make any objection. As an incident of its authority to determine the eligibility of an individual applicant in an isolated case, the Commission might possibly consider such factors. In the present case, however, the Commission has reversed the order of things. Its real objective is to regulate the business practices of the major networks, thus bringing within the range of its regulatory power the chain broadcasting industry as a whole. By means of these regulations and the enforcement program, the Commission would not only extend its authority over business activities which represent interests and investments of a very substantial character, which have not been put under its jurisdiction by the Act, but would greatly enlarge its control over an institution that has now become a rival of the press and pulpit as a purveyor of news and entertainment and a medium of public discussion. To assume a function and responsibility of such wide reach and importance in the life of the nation, as a mere incident of its duty to pass on individual applications for permission to operate a radio station and use a specific wave length, is an assumption of authority to which I am not willing to lend my assent.

Again I do not question the need of regulation in this field, or the authority of the Congress to enact legislation that would vest in the Commission such power as it requires to deal with the problem, which it has defined and analyzed in its report with admirable lucidity. It is possible that the remedy indicated by the proposed regulations is the appropriate one, whatever its effect may be on the sustaining programs, advertising contracts, and other characteristics of chain broadcasting as it is now conducted in this country. I do not believe, however, that the Commission was justified in claiming the responsibility and authority it has assumed to exercise without a clear mandate from the Congress.

An examination of the history of this legislation convinces me that the Congress did not intend by anything in § 303, or any other provision of the Act to confer on the Commission the authority it has assumed to exercise by the issuance of these regulations. Section 303 is concerned primarily with technical matters, and the subjects of regulation authorized by most of its subdivisions are exceedingly specific—so specific in fact that it is reasonable to infer that, if Congress had intended to cover the subject of network contracts and affiliations, it would not have left it to dubious implications from general clauses, lifted out of context, in subdivisions (g), (i) and (r). I am unable to agree that in authorizing the Commission in § 303(g) to study new uses for radio, provide for experimental use of frequencies, and "generally encourage the larger and more effective use of radio in the public interest", it was the intention or the purpose of the Congress to confer on the Commission the regulatory powers now being asserted. Manifestly that subdivision dealt with experimental and development work—technical and scientific matters, and the construction of its concluding clause should be accordingly limited to those considerations. Nothing in its legislative history suggests that it had any broader purpose.

It was clearly not the intention of the Congress by the enactment of § 303(i), authorizing the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting", to invest the Commission with the authority now claimed over network contracts. This section is a verbatim reenactment of § 4(h) of the Radio Act of 1927, and had its origin in a Senate amendment to the bill which became that Act. In its original form it provided that the Commission, from time to

time, as public convenience, interest, or necessity required, should:

"When stations are connected by wire for chain broadcasting, [the Commission should] determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting."

It was evidently the purpose of this provision to remedy a situation that was described as follows by Senator Dill (who was in charge of the bill in the Senate) in questioning a witness at the hearings of the Senate Committee on Interstate Commerce:

". . . During the past few months there has grown up a system of chain broadcasting, extending over the United States a great deal of the time. I say a great deal of the time—many nights a month—and the stations that are connected are of such widely varying meter lengths that the ordinary radio set that reaches out any distance is unable to get anything but that one program, and so, in effect, that one program monopolizes the air. I realize it is somewhat of a technical engineering problem, but it has seemed to many people, at least many who have written to me, that when stations are carrying on chain programs that they might be limited to the use of wave lengths adjoining or near enough to one another that they would not cover the entire dial. I do not know whether legislation ought to restrict that or whether it had better be done by regulations of the department. I want to get your opinion as to the advisability in some way protecting people who want to hear some other program than the one being broadcasted by chain broadcast." (Report of Hearings Before Senate Committee on Interstate Commerce on S. 1 and S. 1754, 69th Cong., 1st Sess. (1926) p. 123.

In other words, when the same program was simultaneously broadcast by chain stations, the weaker independent stations were drowned out because of the high power of the chain stations. With the receiving sets then commonly in use, listeners were unable to get any program except the chain program. It was essentially an interference problem. In addition to determining power and wave length for chain stations, it would have been the duty of the Commission, under the amendment, to make other regulations necessary for "equitable radio service to the listeners in the communities or areas affected by chain broadcasting." The last clause should not be interpreted out of context and without relation to the problem at which the amendment was aimed. It is reasonably construed as simply authorizing the Commission to remedy other technical problems of interference involved in

chain broadcasting in addition to power and wave length by requiring special types of equipment, controlling locations, etc. The statement in the Senate Committee Report that this provision gave the Commission "complete authority . . . to control chain broadcasting" (S. Rep. No. 772, 69th Cong., 1st Sess., p. 3) must be taken as meaning that the provision gave complete authority with respect to the specific problem which the Senate intended to meet, a problem of technical interference.

While the form of the amendment was simplified in the Conference Committee so as to authorize the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting", both Houses were assured in the report of the Conference Committee that "the jurisdiction conferred in this paragraph is substantially the same as the jurisdiction conferred upon the Commission by . . . the Senate amendment." (Sen. Doc. No. 200, 69th Cong., 2d Sess., p. 17; H. Rep. No. 1886, 69th Cong., 2d Sess., p. 17). This is further borne out by a statement of Senator Dill in discussing the conference report on the Senate floor:

> "What is happening to-day is that the National Broadcasting Co., which is a part of the great Radio Trust, to say the least, if not a monopoly, is hooking up stations in every community on their various wave lengths with high powered stations and sending one program out, and they are forcing the little stations off the board so that the people cannot hear anything except the one program.
>
> "There is no power to-day in the hands of the Department of Commerce to stop that practice. The radio commission will have the power to regulate and prevent it and give the independents a chance." (68 Cong. Rec. 3031.)

Section 303(r) is certainly no basis for inferring that the Commission is empowered to issue the challenged regulations. This subdivision is not an independent grant of power, but only an authorization to: "Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." There is no provision in the Act for the control of network contractual arrangements by the Commission, and consequently § 303(r) is of no consequence here.

To the extent that existing network practices may have run counter to the anti-trust laws, the Congress has expressly provided the means of dealing with the problem. The enforcement

of those laws has been committed to the courts and other law enforcement agencies. In addition to the usual penalties prescribed by statute for their violation, however, the Commission has been expressly authorized by §311 to refuse a station license to any person "finally adjudged guilty by a Federal court" of attempting unlawfully to monopolize radio communication. Anyone under the control of such a person may also be refused a license. And whenever a court has ordered the revocation of an existing license, as expressly provided in § 313, a new license may not be granted by the Commission to the guilty party or to any person under his control. In my opinion these provisions (§§ 311 and 313) clearly do not and were not intended to confer independent authority on the Commission to supervise network contracts or to enforce competition between radio networks by withholding licenses from stations, and do not justify the Commission in refusing a license to an applicant otherwise qualified, because of business arrangements that may constitute an unlawful restraint of trade, when the applicant has not been finally adjudged guilty of violating the anti-trust laws, and is not controlled by one so adjudged.

The conditions disclosed by the Commission's investigation, if they require correction, should be met, not by the invention of authority where none is available or by diverting existing powers out of their true channels and using them for purposes to which they were not addressed, but by invoking the aid of the Congress or the service of agencies that have been entrusted with the enforcement of the anti-trust laws. In other fields of regulation the Congress has made clear its intentions. It has not left to mere inference and guess-work the existence of authority to order broad changes and reforms in the national economy or the structure of business arrangements in the Public Utility Holding Company Act, 49 Stat. 803, the Securities Act of 1933, 48 Stat. 74, the Federal Power Act, 49 Stat. 838, and other measures of similar character. Indeed the Communications Act itself contains cogent internal evidence that Congress did not intend to grant power over network contractual arrangements to the Commission. In § 215(c) of Title II, dealing with common carriers by wire and radio, Congress provided:

"The Commission shall examine all contracts of common carriers subject to this Act which prevent the other party thereto from dealing with another common carrier subject to this Act,

and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable."

Congress had no difficulty here in expressing the possible desirability of regulating a type of contract roughly similar to the ones with which we are now concerned, and in reserving to itself the ultimate decision upon the matters of policy involved. Insofar as the Congress deemed it necessary in this legislation to safeguard radio broadcasting against arrangements that are offensive to the anti-trust laws or monopolistic in nature, it made specific provision in §§ 311 and 313. If the existing network contracts are deemed objectionable because of monopolistic or other features, and no remedy is presently available under these provisions, the proper course is to seek amendatory legislation from the Congress, not to fabricate authority by ingenious reasoning based upon provisions that have no true relation to the specific problem.

Mr. Justice ROBERTS agrees with these views.